UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

McCLAIN E-Z PACK, INC.

and

Cases 15–CA–16812
15–CA–16913

PAPER, ALLIED–INDUSTRIAL, CHEMICAL AND
ENERGY WORKERS UNION

Joseph A. Hoffman, Jr., Esq., for the General Counsel.
Thomas H. Williams, Esq., for the Respondent.
Mary E. Olsen, Esq., for the Charging Party.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Selma, Alabama, on July 8 and 9, 2003.[1] The charge in Case 15–CA–16812 was filed on November 5 and was amended on December 30, January 31, 2003, and March 27, 2003. The charge in Case 15–CA–16913 was filed on February 27, 2003 and was amended on March 27, 2003. The consolidated complaint issued on May 30, 2003, and was amended on June 6, 2003. At the hearing, the Respondent and the Charging Party entered into an informal settlement that disposed of all independent Section 8(a)(1) allegations of the complaint as well as the single Section 8(a)(1) and (3) allegation. Although Counsel for the General Counsel did not recommend approval of the agreement, I determined that approval of the settlement did effectuate the purposes of the Act, and I approved it. The remaining complaint allegations are Section 8(a)(5) allegations relating to layoffs and failure to provide employees with a wage increase. The Respondent's answer denies any violation of the Act. I find that the Respondent, with the exception of the layoffs that occurred in November, did violate the Act substantially as alleged in the remaining allegations of complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, McClain E-Z Pack, Inc., the Company, is a Michigan corporation engaged in the manufacture of industrial waste containers at various facilities including its facility at Demopolis, Alabama. The Respondent annually sells and ships from its Demopolis, Alabama, facility products valued in excess of $50,000 directly to points located outside the State of Alabama. The Respondent admits, and I find and conclude, that it is an employer engaged in

[1] All dates are in 2002 unless otherwise indicated.

commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges that Paper, Allied-Industrial, Chemical and Energy Workers Union, the International, and its Local 3-1885, the Local, are labor organizations. The Respondent's answer pleads that the foregoing allegations "assert legal conclusions to which no response is required and which are therefore denied." The answer also affirmatively pleads, without referring to the International or the Local, that "[t]he Union is not a proper and authorized representative" of the unit employees.

On August 22, an election was held among the Company's employees in the following stipulated appropriate unit:

> All welders, team leaders and directors, machine operators, painters, laborers, truck drives, maintenance employees and shipping and receiving employees; Excluded: All sales employees, office clerical employees, professional employees, guards, supervisors as defined by the Act, and all other employees.

There is no evidence that the Respondent raised the issue of whether "the Union" was a "proper and authorized representative" in the representation proceeding. No objections were filed following the August 22 election. On September 3, Local 3-1885 of the Paper, Allied-Industrial, Chemical and Energy Workers Union was certified as bargaining representative of the employees in the foregoing unit. On September 9, International Representative Emory Barnette wrote the Company a letter in which he referred to Local 3-1835. On September 12, the Company's Labor Consultant, Thomas "Tom" Tucker, responded to that letter stating that he had "been retained … to assist the Company in contract negotiations," and that the Company "stood ready to negotiate" with Local 3-1885, the certified collective bargaining representative. Noting the reference to Local 3-1835, Tucker requested clarification. Barnette testified that the reference to Local 3-1835 was a typing error. Tucker acknowledged that, when he and Barnette first talked about the matter, Barnette mentioned an error that Tucker understood to have been on the ballots rather than in the letter. Tucker also mentioned further discussions with Barnette regarding unit clarification in order to assure that the "bargaining agent … that goes in the contract … correspond[s] to what the Labor Board says the bargaining agent is." Tucker, who has been involved with labor relations and representational issues since 1969, testified that he did "not know how unit clarification works." The Respondent's brief does not address its affirmative pleading that "[t]he Union is not a proper and authorized representative" of the unit employees.

The General Counsel, citing *Comet Rice Mills Division, Early California Industries, Inc.,* 195 NLRB 671 (1972), points out that the statutory definition of labor organization requires only that participation by employees is "envisaged" and that the entity exists for statutory purposes "although they never came to fruition." Id. at 674. Although Local 3-1885 currently has no contract to administer, the fact that its effectiveness has not come to fruition is not material. See *Advance Industrial Security, Inc.*, 225 NLRB 151 (1976). Barnette testified to consulting with employees regarding the Respondent's past practices thereby confirming the participation of employees in the Local. Local 3-1885 has been certified by the Board. The parties have been engaging in contract negotiations since October 16 with International Representative Barnette serving as the spokesperson for the Local. I find that employees participate in the foregoing entities, that the International is a labor organization and that the Local, hereinafter referred to as the Union, as it has since September 2002, deals with employers concerning wages, hours, and other terms and conditions of employment. I find and conclude, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Company operates four facilities, one in Michigan, one in Ohio, one in Oklahoma, and the facility involved in this proceeding at Demopolis, Alabama. Kenneth McClain, Owner and President of the Company, acquired the Demopolis facility from Waste Management in July 1996. The Company actually took over operations in September 1996, and Teddy Ford assumed the duties of Plant Manager late in 1996. At the time of the acquisition, Waste Management agreed to purchases over a period of five years that would assure that the production capacity of the facility would be used. Waste Management did not carry out its agreement and, following arbitration, the period was extended. McClain testified that Waste Management did not honor the extended agreement and that, in addition to the absence of revenue from Waste Management, other aspects of the business at other locations were suffering. According to McClain, the bank that had extended credit to the Company required him to sign a personal note and began monitoring the daily activities of the Company.

On August 23, following the election but prior to the Union's certification, Plant Manager Teddy Ford wrote International Representative Emory Barnette advising that the plant would not operate on August 30 or September 2 in order to give employees a four day Labor Day weekend. The letter continues noting that the plant would be scheduled to work 40 hours a week thereafter and that "[w]e may need to require overtime periodically." On September 17, after certification, Plant Manager Ford wrote International Representative Barnette and advised him that the plant would be closed the week of September 30 through October 4 for inventory. Selected employees would work that week performing the inventory. Barnette contacted employee Henry Collins who assured him that inventory was taken every year. Barnette, satisfied that this was an annual occurrence, did not contact Ford.

B. The Layoff

1. Facts

On September 23, the Company heard rumors, which proved to be true, that Waste Management was instituting a purchasing freeze. According to President McClain, this meant that the Company needed "to stop building garbage containers right now."

On September 25, President McClain spoke with Plant Manager Ford regarding the necessity for a layoff. In a brief telephone conversation, McClain directed Ford to lay off employees, explaining that the Company would build only special containers in the immediate future and that the production of standard containers was to cease due to excess inventory. In the course of the conversation, McClain told Ford to call Labor Consultant Tom Tucker, "since he has dealt with unions before and I [Ford] have not," and to have Tucker talk with Emory Barnette. Ford was unable to reach Tucker on September 25, but did speak with him on the morning of September 26. Ford had not identified the specific employees who would be affected by the layoff, and he did not tell Tucker which jobs would be eliminated, the affected departments, or which employees would be laid off. Tucker recalled that, although Ford did not identify the affected employees, he said that the layoff would affect 60 percent of the workforce.

Ford then met with his supervisors and together they identified the employees to be laid off. All employees to be laid off had been identified by 4:16 p.m. on September 26. Ford made no

effort to inform Tucker of the number or identity of the employees who had been selected for layoff. Ford acknowledged that he changed his selection of a few employees to work the inventory so that no employee who worked the inventory would be affected by the layoff.

International Representative Barnett recalls receiving a telephone call from Labor Consultant Tucker sometime after 5 p.m. on September 26. Tucker testified that he had left a message on Barnette's answering machine earlier in the day and that Barnette called him. The message on the answering machine was simply that there was "something very important" that he needed to discuss with Barnette. The word layoff was not mentioned.

Barnette recalls that Tucker told him, "Emory, this is a heads-up. It's been brought to my attention that, effective tomorrow, there [i]s going to be a mass layoff of the employees at McClain." Barnette asked how many employees would be affected and Tucker replied that he did not know but he "thought it would be approximately half of the workforce." Barnette asked what jobs would be affected and how long the layoff would last. Tucker replied, "Mr. Barnette, I don't know the answers to these questions. I am not a employee of McClain. I am hired to assist in the negotiations. This is a heads-up." Barnette asked again, "[W]hat jobs, who, how long," and Tucker responded, "I am not here other than to give you a heads-up. That's it."

Tucker testified that he informed Barnette that the Company was in dire financial straits, more serious that Barnette might have thought, and was planning a layoff that would affect more than 50 percent of the bargaining unit. He testified that he referred to banks applying pressure and requested that Barnette not make public the Company's financial problems. The foregoing reference and request are not contained in a pretrial affidavit executed by Tucker. Tucker testified that he informed Barnette that the layoff would officially commence the week after inventory but that the employees were going to be advised of the layoff the next day "because they would not be working the following week as a result of the inventory." According to Tucker, the conversation concluded with Barnett saying "something like" he knew the Company was having financial difficulties and "it was not unexpected that something like this would happen." Tucker denied that Barnette asked for any information such as the departments affected, the jobs affected, or the identity of the affected employees. Tucker did not deny stating that he was not an employee of McClain, that he was a hired negotiator, and that his call was simply to give Barnett a "heads-up."

Ford recalls that he was at home in the evening when he received a call from Tucker who informed him that he had spoken with Barnette. Ford recalls that Tucker reported to him that Barnette had told him that he "expected something like this to happen at some point" and, contrary to Tucker's denial that Barnette asked any questions, reported that Barnette "wanted to know who it was." Tucker told Ford that he informed Barnett that he did not have the names, but that the layoff would affect "a substantial amount of people." Ford asked Tucker if it was alright to proceed with the layoff and Tucker responded, "I guess so because Mr. Barnette … did not say, 'Let's talk about it.'"

Although Tucker had no recollection of reporting his conversation with Barnette to President McClain, McClain testified that Tucker did report to him and that he was "puzzled that the Union didn't want to talk about it." He also recalls that Tucker "might have mentioned" that the Union asked who was gong to be laid off, how many," but that Tucker did not have that information. McClain testified that he would have "given [the Union] some time," if there had been a request "to talk about it," and delayed the layoff for "a week … ten days."

Barnette and Tucker agree that Tucker informed Barnette that there was to be a mass

layoff of employees the following day. I credit Barnette's testimony that he did question Tucker concerning the number of employees affected, the jobs affected, and the length of the layoff. Although Tucker denied that Barnette asked any questions, Ford recalls that Tucker reported that Barnette had asked "who it was" that was going to be affected by the layoff, and McClain acknowledged that Tucker "might have mentioned" that Barnette wanted to know who was going to be laid off. I further credit Barnette that Tucker disclaimed having any authority, stating that that he was not an employee, that he was hired as the contract negotiator, and that he was simply delivering a message, "a heads-up. That's it."

Employees were advised of the layoff the following morning, September 27. Although the employees' health insurance would not have been interrupted if they had been off of work for the scheduled one-week of inventory, Ford testified that their insurance was cancelled as of September 30. A total of 26 employees, almost half of the employee complement, were laid off.[2]

McClain testified that the Company had "been considering a layoff for some time," but that the final decision was not made until the day Tucker informed the Union of the upcoming layoff. Ford's testimony contradicts this. He was directed on September 25 to lay off employees, and he did not speak to Tucker until September 26. McClain acknowledged that the Company did not give the Union any opportunity for input into the decision.

On October 16, the parties met for their first bargaining session. Ford recalls that Barnette stated that the Union was upset with the "way the layoff was conducted, that the Union did not receive prior notice of the layoff." Tucker responded that he had called him. Barnette acknowledged the call but pointed out that, in that conversation, Tucker had stated that he was "a negotiator," that he was "not the McClain representative." Ford recalled that Barnette then pointed out that, prior to the layoff, he had received letters from Ford, not Tucker, regarding matters that immediately affected the employees' terms and condition of employment.

Barnette confirmed that he expressed his displeasure that he had not received notice of the layoff from the Company, only a call from Tucker who "explicitly told me he was not the Company" but the "contract negotiator" and that he was "giving me a heads-up." Barnette had learned the names of the employees laid off, but did not know their seniority. Following a break, at Barnette's request, Ford presented the Union with a seniority list with asterisks placed beside the names of employees who had been laid off.

At some point thereafter, at the bargaining session, the Company offered to negotiate regarding the layoffs. According to Ford and Tucker, Tucker stated to Barnette that the Company was "prepared to negotiate the layoffs and any issues that you may have." Ford recalled that Barnette responded that the matter was "in the attorneys' hands at that point." Barnette recalls that Tucker offered to negotiate regarding the effects of the layoff. When Tucker did so, Barnette asked him, "Are you telling me you're going to put these people back so we can negotiate from that point?" Tucker replied, "No." Tucker did not specifically deny the foregoing exchange.

The Respondent laid off three additional employees on November 15. The initial charge relating to the September layoff had been filed on November 5. Ford testified that the possibility of additional employees being laid off was mentioned at a negotiating session on October 29 and that Barnette said that "it should not be a problem" because he knew that things were slow.

[2] Because of the settlement of the single Section 8(a)(3) allegation, only 25 employees are named in my recommended Order.

Tucker did not address any conversation at the bargaining table, but he did testify that, upon learning that additional employees would be laid off, he left a message on Barnette's answering machine on November 6 advising that between two and four employees were going to be laid off and that, just to make certain, he called again and reached Barnette's wife who confirmed that Barnette had received the message. On November 11, Tucker actually spoke with Barnette and gave him the names of the three employees who were to be laid off. Barnette asked why the employees were being laid off, and Tucker replied, "lack of work."

Barnette testified that he did not become aware of the November 15 layoffs "until I did an affidavit a couple of months ago," that when giving the affidavit he was questioned about the layoff and "I did not have an answer. I did not know about it." The Charging Party International Union filed an amended charge alleging the November layoffs on March 27, 2003. It is signed by counsel, not Barnette. The record does not reflect when or how the General Counsel or the Charging Party became aware of the November layoff. Barnette's wife did not testify. Barnette denied receiving any message or having any conversation with Tucker regarding the November layoff. Barnette did not testify that he protested these layoffs after he learned of them.

2. Analysis and concluding findings

All parties agree that the foregoing layoffs were economic layoffs. The complaint alleges that the Respondent laid off employees without notice to or bargaining with the Union on September 27 and November 15. Regarding the September layoff, the Respondent argues that the layoff did not occur until October 7, the Monday following the already planned shutdown for inventory. I disagree. Ford admitted that he revised his selection of employees who would be conducting the inventory so that no employee involved in the inventory would thereafter be laid off. Under the planned shutdown for inventory, the employee benefit of health insurance would not have been suspended. The health insurance of all laid off employees was cancelled on September 30. The employees who were informed of the layoff on September 27 were paid for that day. I find that the layoff occurred on September 27.

The Respondent did not offer to bargain regarding either the decision or the effects of the decision to effectuate an immediate economic layoff. McClain's testimony that the layoff could have been delayed for up to a week or 10 days, if the Union had requested bargaining, belies any claim of an emergency. Decisions to conduct economically motivated layoffs are mandatory subjects of bargaining. In *Dubuque Packing Co.,* 303 NLRB 386 (1991), the Board summarized the holding of the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and noted that managerial decisions regarding such issues as the "order of succession of layoffs and recalls" fall within the second category of managerial decisions that "are almost exclusively an aspect of the relationship between employer and employees and as to these there is an obligation to bargain. Id. at 667." *Dubuque*, supra at 388.

The Respondent, in its brief, argues that the Union failed to request bargaining and thereby waived its rights. The foregoing argument fails to note, as pointed out in the brief of the Charging Party, that the decision to lay off was made by President McClain well before any notice was given to the Union and that, by the time Tucker spoke to Barnette, the affected employees had already been determined, although Ford had not bothered to inform Tucker of their identity. The Respondent announced a fait accompli through Tucker who served only as messenger. Although McClain testified that he would have been willing to delay the layoff for a short period, that willingness was not communicated by Tucker to Barnette who was simply given a "heads up" that a mass layoff would occur the very next day. Tucker provided no information and, when questioned, stated that he "was not the Company," he was only the

negotiator. Following those comments, it was obvious that any request would have been futile since Tucker had neither authority nor information. The futility of any request to bargain is confirmed by Tucker's final response to Barnette: "I am not here other than to give you a heads-up. That's it."

The Respondent was obligated to give notice of this major change in the status quo in circumstances that provided the Union with a meaningful opportunity to bargain. The Board, in *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), explained that "[t]he issues of "fait accompli," "request to bargain," and "waiver" are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver." Id. at 1023. The Board then cites the following principle stated in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982):

> The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.

The Respondent's communication of a "heads up" regarding a layoff of that would occur in less than 24 hours by an individual who disclaimed having any authority and who had no information constituted announcement of a fait accompli. There was no offer to bargain. The decision to layoff had been made and the employees to be laid off had been identified. The absence of any intention on the part of the Respondent to alter its decision is established by the events following the layoff. Although Tucker reported Barnette's request to know "who it was" involved in the layoff to Ford, it was not until October 16 that Ford provided that information to the Union. At the bargaining session on October 16, when the Union objected to the absence of meaningful notice, the Respondent did not offer to restore the status quo. Although the Respondent, after the Union's protest, offered to bargain, Tucker stated to Barnette that the Respondent was not willing to recall any laid off employees. As the Board explained in *Porta-King Building Systems*, 310 NLRB 539 (1993):

> An offer to bargain over layoffs after they have occurred is no substitute for … prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. … [I]n cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargain …. [Citations omitted.] Ibid.

The Respondent, by laying off employees on September 27 without providing the Union with sufficient notice to permit meaningful bargaining regarding the decision to lay off employees or the effects of that decision violated Section 8(a)(5) of the Act.

Regarding the November 15 layoffs, Tucker's detailed testimony, including calling Barnette's wife to assure that he had received his message and calling again to give the names of the three affected employees as soon as he received them, confirms that Barnette had sought details regarding the extent of the layoff in September and that Tucker was not going to repeat his September performance. Following the filing of the unfair labor practice charge regarding the

September layoff on November 5, I find it incredible that Tucker would have failed to contact the Union when there was time to address the November layoff before it occurred. Although I found Barnette, both by his demeanor and recollection, to be more credible than Tucker, in this instance I find that Barnette simply forgot that he had spoken with Tucker. His lack of recollection is understandable since it was clear that any negotiations regarding the layoff of three additional employees would be a mere formality in view of the facts that virtually half of the unit had been laid off in September and that the Respondent had refused to restore the status quo on October 16. Nevertheless, I find that the Union did receive notice sufficiently prior to the proposed November layoff to provide an opportunity for bargaining, but that the Union did not request bargaining. Barnette protested to Tucker the absence of meaningful notice regarding the September layoffs. As hereinafter discussed, he also raised the failure of the Respondent to adjust employee wages in January 2003. The absence of any protest regarding the November layoffs suggests that, upon reflection after he gave his affidavit, Barnette recalled that he had been notified of them. The General Counsel has not established that the November layoff occurred without the Respondent providing sufficient notice and an opportunity to bargain to the Union. I recommend that allegation be dismissed.[3]

C. The Cost of Living Adjustment

1. Facts

The Respondent, each year since 1996, has adjusted employee wages at the beginning of each new year. Testimony and documentary evidence establishes that, although the adjustment may not have been made on January 1, increases were paid retroactively to January 1 or the first pay period in January. A fire in 1999 destroyed company records prior to that year. On January 10, 2000, the Company announced a 2.5% wage increase retroactive to January 3, the beginning of the pay period. On January 15, 2001, the Company announced a 2.5 percent wage increase retroactive to January 1. On January 1, 2002, the Company announced an immediately effective wage increase of 20 cents an hour. In 2003, no wage increase was given, nor, so far as the record shows, was any announcement made stating the Company's financial inability to give a wage increase.

At the outset of negotiations, the Union proposed and the Company agreed to bargain regarding contractual language before addressing economics. Although the Company thereafter requested that the Union present an economic proposal, the Company made no economic proposal and the Union, consistent with the protocol to which the parties agreed at the outset of negotiations, declined to make an economic proposal until the noneconomic terms of the contract had first been addressed. The Union was not informed that the Company was discontinuing its practice of adjusting wages effective January 1. The Company made no statement to the Union that it was discontinuing that past practice.

International Representative Barnette heard from some employees that there had been talk at the plant attributing the absence of a wage increase in January 2003 to the presence of the Union. After hearing this, Barnette spoke with Labor Consultant Tucker and stated, "[T]his … International never would stand in the way of a local receiving a cost of living [adjustment] prior to us reaching a settlement [on the contract.]" The record reflects no response by Tucker. Tucker did not deny that Barnette made the foregoing statement to him.

[3] Although both Tucker and Ford refer to the layoff of three employees, the complaint names only two.

President McClain did not address the absence of a wage adjustment in 2003. Plant Manager Ford testified that, "if the Company had the money to give, then the Company g[a]ve the money," implying that no increase was given in 2003 because of the Company's economic plight. Tucker acknowledged that he was aware of the Company's past practice but that increases were dependent upon the Company's financial health. He noted that he discussed the past practice with management officials but, given the Company's financial condition, there was "no money there," so "we didn't go to the Union about it." Tucker further noted that he discussed "what McClain would have done had the Union not been there," and that because it would have been a "takeaway we decided not to approach the Union and ask for a takeaway."

The General Counsel adduced no evidence establishing the criteria that the Company utilized in determining the amount of increases, if any, to be given to employees. The only evidence on this record is the fact that, from 1997 through 2002, some increase was given.

2. Analysis and concluding findings

The Complaint alleges that the Respondent unilaterally failed to grant a Cost of Living Adjustment to employee wages in accord with its past practice. The Respondent never identified the annual increase as a cost of living adjustment; documents refer simply to a "wage increase." "[A]n employer that has a practice of granting merit raises that are fixed as to timing but discretionary in amount may not discontinue that practice without bargaining to agreement or impasse with the union. See *Daily News of Los Angeles*, 315 NLRB 1236 (1994)." *Harrison Ready Mix Concrete Co.*, 316 NLRB 242 (1995). Although the discretionary increases given by the Respondent herein were across the board increases rather than individual merit raises, the foregoing principle is controlling. "The Board has long held that to the extent that a wage increase is devoid of discretion, the employer is obligated to continue such wage increase even without notice or bargaining. To the extent that the employer retained discretion however, it is obligated to consult with the employees' bargaining representative before taking any action." *Eagle Transport Corp.*, 338 NLRB No. 55, JD slip op. at 6 (2002) citing *Hanes Corp.*, 260 NLRB 557 (1982), and *Oneita Knitting Mills, Inc.*, 205 NLRB 500, fn. 1 (1973). In the absence of any increase or statement of financial inability of the Respondent to grant an increase, the employees were left with the impression that, following the selection of the Union as their collective bargaining representative, the Respondent had discontinued a past practice.

Notwithstanding the impression left with employees, the record herein does not establish that the practice of giving an annual wage adjustment was discontinued. Tucker's uncontradicted testimony establishes that the Respondent elected not to advise the Union that it was financially unable to increase wages. The amount of the annual January wage adjustments was discretionary. As reflected above, in 2000 and 2001 they were given as percentages and in 2002 as 20 cents. Insofar as the Respondent's financial constraints dictated that there would be no increase, so be it. There was, however, an obligation to address the issue and negotiate with the Union regarding the discretionary amount of the increase.

The Respondent contends that it had no obligation to bargain regarding the annual wage adjustment because the Union did not request bargaining. In support of this contention, the Respondent argues that it "did request bargaining about economics" and that the Union, consistent with the protocol pursuant to which the parties agreed to first address noneconomic contractual matters, refused. The Respondent's brief fails to note that it presented no economic proposal and that its request to address economic issues consisted of a request that the Union present an economic proposal. The Union had no obligation to request bargaining regarding the

continuation of a past practice. The protocol simply set the format for negotiations, it did not waive the Union's right to notice prior to discontinuation of a past practice. See *Vico Products Co.*, 336 NLRB 583, 598 (2001).

Once the employees selected the Union as their collective bargaining representative, the Respondent was not privileged to unilaterally decide that it would not "go to the Union about" the discretionary amount of an annual increase that had been given for six years but that would not be given in 2003. By failing to bargain with the Union regarding the amount of its 2003 annual employee wage adjustment, the Respondent violated Section 8(a)(5) of the Act.

Conclusions of Law

1. By unilaterally laying off employees without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of that decision, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By failing to bargain with the Union regarding the amount of its annual employee wage adjustment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully laid off employees, it must, on request, bargain with regard to that decision and the effects of that decision, and it must, to the extent it has not already done so, offer the affected employees reinstatement to their former or substantially equivalent positions and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from September 30, 2002 (the employees were paid for September 27), to date of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having failed to bargain with the Union regarding the discretionary amount of the 2003 annual wage adjustment, it must bargain with the Union in that regard. The Respondent's past practice establishes that the monetary amount of wage adjustments was discretionary, and there is no evidence of any objective criteria upon which the discretionary amount of those adjustments was predicated. Thus, contrary to the argument of the Charging Party, I have no basis for fashioning any remedy upon which a liquidated amount can be computed. Board precedent is clear that administrative law judges may not prescribe agreements for the parties. Thus, with regard to the 2003 wage adjustment, the Respondent shall be ordered, on request, to bargain in good faith regarding the amount, if any, of such adjustment.

On these findings of fact and conclusions of law and on the entire record, I issue the

following recommended[4]

ORDER

The Respondent, McClain E-Z Pack, Inc., Demopolis, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of that decision.

(b) Failing to give notice to and bargain with the Union regarding the amount of its annual employee wage adjustment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Paper, Allied-Industrial, Chemical and Energy Workers Union Local 3-1885 as the exclusive representative of the employees in the following appropriate unit concerning the decision to lay off employees on September 30, 2002, and the effects of that decision:

> All welders, team leaders and directors, machine operators, painters, laborers, truck drives, maintenance employees and shipping and receiving employees; Excluded: All sales employees, office clerical employees, professional employees, guards, supervisors as defined by the Act, and all other employees.

(b) On request, bargain with the Union regarding the amount of its 2003 annual employee wage adjustment.

(c) Within 14 days from the date of this Order, to the extent that it has not already done so, offer the following employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Henry Allen	Melvin Epps	Samuel Ormond
Bobby Biffle	Sam Hatter	Franklin Owens
Leroy Brown	Richard Ingram	Connie Thurman
Victor Bryant	Horace Jackson	James Ward
W. B. Clark	Robert Johnson, Jr.	Lamar Ward
Henry Collins	Robert Johnson	Marquis Washington
Shawn Crockett	Andre Keller	Michael Whitfield
Jesse Daniels	Clint Moore	Terry Winston

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Sanduan Dunning

(d) Make whole the employees named above in subparagraph 2(c) for any loss of earnings and other benefits suffered as a result of the unlawful actions found herein in the manner set forth in the remedy section of the decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Demopolis, Alabama, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 26, 2003

_____
George Carson II
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT lay off any of you in the appropriate unit represented by Paper, Allied-Industrial, Chemical and Energy Workers Union Local 3-1885 without first giving notice to the Union and providing the Union with an opportunity to bargain about the layoff decision and the effects of that decision.

WE WILL, on request, bargain with the Union concerning the layoff of September 30, 2002.

WE WILL, within 14 days from the date of the Board's Order, to the extent that we have not already done so, offer the employees named below immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole in the manner set forth in the remedy section of the decision.

Henry Allen	Melvin Epps	Samuel Ormond
Bobby Biffle	Sam Hatter	Franklin Owens
Leroy Brown	Richard Ingram	Connie Thurman
Victor Bryant	Horace Jackson	James Ward
W. B. Clark	Robert Johnson, Jr.	Lamar Ward
Henry Collins	Robert Johnson	Marquis Washington
Shawn Crockett	Andre Keller	Michael Whitfield
Jesse Daniels	Clint Moore	Terry Winston
Sanduan Dunning		

WE WILL NOT fail and refuse to bargain with the Union concerning your annual wage adjustment.

WE WILL, on request, bargain with the Union regarding the amount of the 2003 annual employee wage adjustment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

McCLAIN E-Z PACK, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610, New Orleans, LA 70112–3723
(504) 589–6361, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589–6389